IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *ex rel.* TODD HEATH, Plaintiff/Relator,	)	Lead Case No. 2:08-C-0724
v.	)	Judge Lynn Adelman
WISCONSIN BELL, INC. Defendant.	)	

WISCONSIN BELL'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant, Wisconsin Bell Inc. ("Wisconsin Bell"), submits this Memorandum in Support of its Motion to Dismiss the Amended Complaint of Plaintiff/Relator Todd Heath ("Relator") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

Relator's original complaint in this case was patently deficient. Faced with two motions to dismiss, Relator abandoned that complaint and has now submitted an Amended Complaint. The Amended Complaint jettisons all original defendants but one (Wisconsin Bell) and casts off all the original counts but one (the alleged violation of the False Claims Act or "FCA"). It then pads that count with more allegations of wrongdoing. Yet the Amended Complaint suffers from the same deficiencies as its predecessor (lack of subject matter jurisdiction and failure to state a claim) and reveals another deficiency (failure to file suit within the statute of limitations).

Lack of Subject Matter Jurisdiction. The linchpin of the Amended Complaint is the same publicly available information that barred the original complaint: the Voice Network Services ("VNS") Agreements between Wisconsin Bell and the state of Wisconsin Department of Administration. The main premise of the Amended Complaint is that Wisconsin Bell supposedly hatched some decade-long scheme to overcharge the Universal Service Fund, and fraudulently concealed these publicly available contracts from schools, libraries, and the Fund's administrator. Over and above the inherent implausibility of Relator's theory – the notion that Wisconsin Bell successfully concealed from government officials information that was publicly available from the state government and posted on the state's website – the Court lacks subject matter jurisdiction to consider that theory.

The law is clear that a relator may not bring a *qui tam* action on behalf of the United States under the FCA unless he or she brings useful information to the table, *i.e.*, nonpublic information that is not otherwise available to the government. Under the FCA, there is no federal

subject matter jurisdiction for claims that are premised on nothing more than the relator's synthesis of publicly available information, as is the case here.

Relator's new allegations about administrative fees run into the same jurisdictional bar. The Amended Complaint asserts that Wisconsin Bell should have prevented schools and libraries from submitting claims for reimbursement that included such fees, because those fees were not eligible for support. But before Relator made these allegations, Wisconsin Bell disclosed the fee issue directly to the government. Further, on behalf of the schools and libraries, Wisconsin Bell returned all funds that might have been associated with the fees. Relator cannot bring suit in the government's name, based on an issue the government already knew. The Amended Complaint must therefore be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

Failure To State A Claim. The Amended Complaint still fails to plead the circumstances of the alleged fraud with particularity. Relator adds ink but no substance to the allegations of the original complaint. The Amended Complaint still does not identify with the required specificity a single false statement or claim made by anyone from Wisconsin Bell, let alone provide a factual basis from which this Court could plausibly infer that such statements or claims were false or that Wisconsin Bell knew of such falsity. Much of the Amended Complaint simply restates the vague, non-specific allegations of the original complaint. The remainder tries to prop up those deficient allegations by suggesting that Wisconsin Bell falsely certified that its invoices complied with an FCC requirement that prices be set at the "lowest corresponding price." In reality, none of the certification forms referenced by the Amended Complaint contains any representation (by Wisconsin Bell or anyone else) about "lowest corresponding price." The Court should accordingly dismiss the Amended Complaint with prejudice under Rules 9(b) and 12(b)(6).

Statute of Limitations Bar. The Amended Complaint adds an argument that the FCA's six-year statute of limitation should be tolled – a virtual admission that a substantial portion of

Relator's claims fall outside the limitations period. The tolling argument fails, because the great weight of authority holds that the FCA's tolling provision does not apply to suits brought by *qui tam* relators where, as here, the government does not intervene. Thus, if the Amended Complaint is allowed to proceed at all, the Court should strike the tolling allegations.

ALLEGATIONS

The federal E-Rate Program ("Program") provides discounts to "eligible" public schools and libraries (applicants) when they buy certain "eligible" services (predominantly telecommunications and Internet access) from service providers in the private market. (Am. Compl. ¶ 25.) The Schools and Library Division ("SLD") of the Universal Service Administrative Company ("USAC") administers the Program.[1] (*Id.*) The FCC's rules also allow schools and libraries to "form consortia with other eligible schools and libraries" and with certain health care providers and public sector entities. 47 C.F.R. § 54.501(c). The rule contains several provisions that state which schools, libraries and consortia are "eligible" (or not eligible) for discounts. *Id*. § 54.501(a) (schools), § 54.501(b) (libraries), & § 54.501(c) (consortia). Another rule defines "[e]ligible services." *Id*. § 54.502.

Eligible schools and libraries participating in the Program can receive discounts from 20 to 90 percent of the cost of eligible services, with contributions to the Universal Service Fund ("USF") making up the balance of the price paid to the service provider. (Am. Compl. ¶¶ 26–28.) Telecommunications providers (like Wisconsin Bell) pay into the USF and assess a USF fee that appears on telephone bills. (*Id.* ¶ 23.)

Once an applicant selects a service provider, it makes a funding request to SLD on "Form 471," seeking approval for it to purchase the service from that service provider subject to the discount available under the Program. 47 C.F.R. §§ 54.504(a), 54.511(a). If approved, depending

[1] USAC is a Delaware non-profit corporation established by the Federal Communications Commission ("FCC"). (Am. Compl. ¶ 24.)

on the applicant's preference, the school or library will then either (i) pay the service provider's bills *in toto* and seek reimbursements from the SLD for the discounted portion of the bill[2] or (ii) pay only the nondiscounted portion of the service provider's bill and request that the service provider seek reimbursement on the discounted portion directly from SLD. *Id.* § 54.514(a).

A number of regulations govern the Program. Many of those rules apply to the applicants that receive support: as examples, section 54.503 establishes detailed requirements for soliciting competitive bids from service providers; section 54.504 governs applicants' requests for services; section 54.508 requires applicants to "develop a technology plan when requesting discounts" for certain services; and section 54.513 prohibits applicants from reselling or transferring discounted services except in certain limited circumstances.

The regulation at issue here applies to service providers. Section § 54.511(b) states:

> Providers of eligible services shall not charge schools, school districts, libraries, library consortia, or consortia including any of these entities a price above the *lowest corresponding price* for supported services, unless the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory.

47 C.F.R. § 54.511(b) (emphasis supplied). The Program regulations define "lowest corresponding price" ("LCP") as follows:

> "Lowest corresponding price" is the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.

Id. § 54.500(f). The FCC's rules contain an express mechanism for resolving "Rate disputes." *Id*. § 54.504(c). Applicants and service providers alike "have recourse" to the FCC for disputes over rates for interstate services, and to the appropriate state regulatory commission for disputes over intrastate rates. *Id*. Applicants may "request lower rates if the rate offered by the carrier does not

[2] Even if an applicant elects this reimbursement method, SLD provides the reimbursement in the first instance to the service provider. Program rules then require that the service provider pass this reimbursement back to the applicant within 20 business days. *See* 47 C.F.R. § 54.514(b).

represent the lowest corresponding price," while "[s]ervice providers may request higher rates" if they can show the LCP "is not compensatory." *Id.* § 54.504(c)(1)–(2).

Relator alleges that Wisconsin Bell entered into VNS Agreements with the state's Department of Administration ("DOA"). (Am. Compl. ¶ 38.) The most recent Agreement (and the one on which the Amended Complaint focuses) is dated June 1, 2006. (*Id.*) The Agreement sets out Wisconsin Bell's price for providing state departments and agencies with certain telecommunications services. (*Id.* ¶ 39.) Relator alleges that public school districts are "authorized users" entitled to enjoy the Agreement's prices. (*Id.* ¶ 40.) The VNS Agreement is available on the State's official website (http://www.doa.state.wi.us/subcategory.asp?linksubcatid=1397&locid=155) (last visited Jan. 29, 2012).

The Amended Complaint does not challenge the VNS Agreement. Rather, Relator claims that Wisconsin Bell entered into "a large number" of unspecified other contracts for unmentioned services at unidentified times with Wisconsin schools and libraries. (Am. Compl. ¶ 33.) The Amended Complaint alleges that at some unsaid times, Wisconsin Bell "withheld information" from these schools and libraries about the discounted rates available under the VNS Agreement, and "billed almost all of them at much higher rates." (*Id.* ¶ 42.) As a result, Relator claims that "many schools paid vastly more" than the lowest corresponding price. (*Id.* ¶ 43.) Relator then asserts the USF paid claims to Wisconsin Bell that "should not have been paid at all, or should only have been paid at lesser amounts than those sought." (*Id.* ¶ 79.)

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE RELATOR'S FCA CLAIMS BECAUSE THEY ARE BASED UPON PUBLIC DISCLOSURES.

The False Claims Act ("FCA") "authorize[s] both the Attorney General and private *qui tam* plaintiffs to recover from persons who make false or fraudulent claims for payment to the

United States." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396, 1400 (2010). But to guard against "parasitic lawsuits" by opportunistic relators, Congress passed the "public disclosure bar, which deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels." *Id*. at 1401, 1407; *see also Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009) ("a public disclosure occurs when the critical elements exposing the transaction as fraudulent are placed in the public domain." (internal quotations and citation omitted)). The public disclosure bar "serves the concern of utility, that is of paying only for useful information." *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1047 (8th Cir. 2002).

The applicable public disclosure bar was codified at 31 U.S.C. § 3730(e)(4)(A).[3] At the time pertinent to this lawsuit, that statute provided:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Thus, a court has jurisdiction over an FCA lawsuit otherwise subject to the public disclosure bar only when "the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" is "an individual who [1] has direct and independent knowledge of the information on which the allegations are based and [2] has voluntarily provided the information to the Government before filing an action." *Id.* at §

[3] The public disclosure provision was amended by the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010). The amendment limited the public disclosure provision to disclosures from federal sources or news media. However, this amendment is not retroactive. *Graham County*, 130 S. Ct. at 1400 n. 1. Therefore, the version of 31 U.S.C. § 3730(e)(4) that was in effect when Relator's initial complaint was filed in 2008 governs this suit. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1889 n. 1 (2011).

3730(e)(4)(B). However, "[k]nowledge that is based on research into public records, review of publicly disclosed materials, or some combination of these techniques is not direct." *U.S. ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 59 (1st Cir. 2009).

Relator makes the bald assertion that his Amended Complaint is based on "original and first-hand knowledge and information," and that he advised the United States regarding that information before filing suit. (Am. Compl. ¶ 7.) But the specific allegations of the Amended Complaint belie this assertion. Relator's principal FCA claim is that Wisconsin Bell charged certain Wisconsin school districts, and thereby USAC, prices for telecommunications services that were not in compliance with LCP requirements. (*Id*. ¶ 37.) The crux of the Amended Complaint is that (i) the VNS Agreement discloses the lowest corresponding price, and (ii) the prices charged by Wisconsin Bell in some cases were higher than the prices contained in the VNS Agreement. On that basis alone, the Amended Complaint concludes that Wisconsin Bell was not billing USAC in compliance with E-Rate regulations.

But all of that information is and was publicly available. The VNS Agreement is available online at http://www.doa.state.wi.us/subcategory.asp?linksubcatid=1397&locid=155. Likewise, the actual prices charged by Wisconsin Bell for telecommunications services are also known to USAC. Before USAC approves an E-Rate funding request, an applicant must submit a Services Ordered and Certification Form (FCC Form 471). 47 C.F.R. § 54.504(a). As part of this Form 471, an applicant is required to include an attachment with "a line-item listing of the products and/or services requested with their associated costs." *See* FCC Form 471 and Instructions for Completing FCC Form 471, attached as Ex. D. Thus, there was a public disclosure of the critical elements upon which Relator has based the entire Amended Complaint.

Indeed, Relator admitted in his original complaint that he obtained a copy of the current VNS Agreement "through a public records request." (Original Compl. ¶ 37.) Information

obtained in response to a public records request is an administrative "report" and falls squarely within the FCA's public disclosure bar. *Schindler*, 131 S. Ct. at 1896 (FOIA responses are reports subject to public disclosure bar). Records requests under state law are also subject to the public disclosure bar. *See Graham County Soil & Water*, 130 S. Ct. at 1411 (disclosures made in state or local reports, audits or investigations may trigger the public disclosure bar); *U.S. ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 442 (5th Cir. 2008) (finding that information relator received pursuant to Texas Public Information Act request was a "public disclosure"); *U.S. ex rel. Lewis v. Walker*, 738 F. Supp. 2d 1284, 1294 (M.D. Ga. 2010) (holding that information disclosed under the FOIA or the Georgia Open Records Act was "publicly disclosed").

Plainly, Relator knows his admission was fatal, because the Amended Complaint omits that admission. Putting aside the irony of Relator's attempt to erase facts in a complaint alleging fraudulent concealment, Relator's original admission cannot be erased. It is still evidence[4] – and uncontroverted evidence at that. More fundamentally, Relator's omission cannot change the underlying – and conclusive – fact that the VNS Agreement is publicly available on-line

The Supreme Court's analysis in affirming dismissal of the relator's case in *Schindler* applies equally well to this case:

> The sort of case that [relator] has brought seems to us a classic example of the "opportunistic" litigation that the public disclosure bar is designed to discourage. Although [relator] alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA.

[4] *See Fuhrer v. Fuhrer*, 292 F.2d 140, 144 (7th Cir. 1961) (noting the defendants could enter a superseded complaint into evidence at trial); *First Bank of Marietta v. Hogge*, 161 F.3d 506, 510 (8th Cir. 1998) (statements from superseded pleading "are admissible evidence that can be weighed like any other admission against interest of [the pleader]").

Schindler, 131 S. Ct. at 1894. As in *Schindler,* Relator's Amended Complaint is "opportunistic" litigation – based on nothing more than obtaining agreements that could have been obtained by anyone searching public records or trolling the Internet, and comparing those agreements to prices that were also openly disclosed.

The same jurisdictional bar defeats the Amended Complaint's "new" allegation that some schools and libraries did use the VNS Agreement, but sought Program reimbursement on ineligible administrative fees. (Am. Compl. ¶ 48.) Relator theorizes that Wisconsin Bell was aware of this possibility and failed to prevent it by explaining, in advance, the ineligibility of the administrative fee to those schools and libraries. (*Id.* ¶ 51.) Over and above the fact that such allegations fail to allege any actionable false claim by Wisconsin Bell, Relator's allegations were already disclosed to USAC – by Wisconsin Bell – before Relator raised them here. *See* Ex. F (Hoskins Dec.) Attachment A.[5] On October 19, 2011, Wisconsin Bell paid the USF more than $100,000 on behalf of schools and libraries that had purchased services under the VNS Agreement and may have included ineligible administrative fees when seeking Program reimbursements. *Id*. The accompanying letter fully explained to USAC the VNS Agreement, the administrative fee, and how the potential error may have occurred. *Id.*

Wisconsin Bell's disclosure to USAC is obviously a public disclosure under the FCA. *See Glaser*, 570 F.3d at 913 (public disclosure includes disclosure of information to the government officials with responsibility over the claims). Such a disclosure bars subsequent *qui*

[5] Because the FCA's public disclosure bar is jurisdictional, the Court can consider material outside of the pleadings in evaluating whether to apply that bar. *See Ondis*, 587 F.3d at 53–54 (affirming dismissal of FCA claim and noting that court held evidentiary hearing to decide whether to apply the public disclosure bar); *see also U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 255 F. Supp. 2d 351, 362–63 (E.D. Pa. 2002) (granting in part Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and noting that, when evaluating challenge under the public disclosure bar of the FCA, "the court may consider and weigh evidence outside the pleadings to determine if it has jurisdiction").

tam complaints that are, as here, "substantially similar to [the] publicly disclosed allegations." *Id.* at 920. The allegations of the December 9, 2011 Amended Complaint do no more than recite – in less detail – the same facts set out in Wisconsin Bell's October 19, 2011 letter to USAC. Moreover, before Relator uttered word one about these latest allegations, Wisconsin Bell had not only alerted USAC but also compensated the government for any potential overbilling on behalf of the schools and libraries involved. Thus, top to bottom, the Amended Complaint is prohibited by the public disclosure bar, and must be dismissed for lack of subject matter jurisdiction.

II. THE AMENDED COMPLAINT ALSO FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Over and above the lack of subject matter jurisdiction, the Amended Complaint also fails to state a claim for multiple reasons: (a) it fails to plead fraud with sufficient particularity as required under Federal Rule of Civil Procedure 9(b); (b) it fails to identify a false statement or claim; (c) it fails to plead a factual basis for Wisconsin Bell's knowledge of a falsehood and (d) Relator can never meet this pleading requirement with respect to knowledge because his claims are, at most, a dispute over the proper interpretation of the Program's ambiguous LCP rules. Wisconsin Bell will address each issue in turn below.

A. The Amended Complaint Fails to Plead Fraud with Sufficient Particularity as Required Under Fed. R. Civ. P. 9(b).

The Supreme Court has made clear that the pleading standard of the Federal Rules "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (a district court must decide whether a complaint has "enough substance to warrant putting the

defendant to the expense of discovery."). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

Furthermore, the FCA "is an anti-fraud statute and claims under it are subject to the heightened pleading requirements of Rule 9(b)." *U.S. ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 604 (7th Cir. 2005). Federal Rule of Civil Procedure 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The circumstances to be stated with particularity are "the who, what, when, where, and how: the first paragraph of any newspaper story" of the alleged fraud or falsity. *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). To satisfy Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 942-43 (6th Cir. 2009). Even though the motions to dismiss put Relator on notice about the pleading deficiencies in the original complaint, and even though the Amended Complaint represents Relator's second attempt to plead fraud with particularity, it still fails to provide the necessary details.

1. Relator Still Fails To Provide Sufficient Detail To Support The Allegations Of "Implied" Misrepresentations.

In this iteration of Relator's complaint, Relator tries two separate paths to allege fraud. Each path is a dead end.

Relator's first path is a theory of "implied" misrepresentation. (Am. Compl. ¶¶ 52–58.) Relator's use of the term "implied" is essentially an admission that Relator still has not pled and cannot plead any specific statements or omissions on which the alleged "fraud" is based. Relator

still has not pled the "who, what, where, and when of the alleged fraud." Instead, Relator has repackaged the deficient allegations of the original complaint, and now asks the Court to "imply" fraud even though there are no specific allegations to support a finding of fraud.

First, the Amended Complaint does not identify "who" from Wisconsin Bell made or omitted to make statements associated with this contract. The most Relator can muster is vague accusations about unnamed "sales representatives" and unnamed individuals somewhere within Wisconsin Bell's "sales force." (Am. Compl. ¶¶ 36 & 45.)

Second, the Amended Complaint does not identify the persons to whom these statements were made. Relator offers a few "examples" of schools or libraries that allegedly paid more for certain telecommunications services than the prices contained in the VNS Agreement. (Am. Compl. ¶ 37.) But Relator has not identified any specific statements or omissions directed to anyone employed by any of these "example" schools or libraries. Nor has Relator identified any specific persons employed by those schools or libraries who received any false statements.

Third, Relator does not give the "when" or "where" of the allegedly fraudulent statements or omissions; only the patently insufficient vagaries that statements were made at some unspecified time "in the past." (Am. Compl. ¶ 45.) Likewise, Relator does not identify "what" was said. Rather, the Amended Complaint simply alleges that some unidentified person at Wisconsin Bell "offered rates" in some unspecified statement, and assumes fraud because that unspecified statement did not include information about the VNS prices. (*Id*. ¶¶ 37, 42.) The Amended Complaint still does not describe any specific representations that anyone from Wisconsin Bell made to *anyone* regarding any rates. If Wisconsin Bell "routinely" misled applicants, the way Relator claims (*id*. ¶ 42), Relator should have had no problem identifying specific instances. Yet even on the second try Relator has not identified any false statement with

particularity. And because the content of the alleged false statements has not been alleged, there is no basis for understanding *why* they were allegedly fraudulent.

The Amended Complaint only compounds these deficiencies by alleging (¶¶ 68–71) that Wisconsin Bell caused *applicants* to make false statements that their purchases complied with Program rules, in various forms submitted to USAC. In the first place, the Amended Complaint has failed to address the underlying problem: there are still no details to show "what" statements by Wisconsin Bell caused this second (inadvertent) fraud by E-Rate applicants, "who" at Wisconsin Bell made those statements, or "when" or "where" those statements were made. Further, the alleged second fraud by applicants only adds another layer of non-specificity. Relator does not say which applicants made false statements or when; he simply describes generic forms that all applicants must submit, without saying *which* submissions were false. (Am. Compl. ¶¶ 68–71.) The Amended Complaint itself acknowledges (¶ 42) that Wisconsin Bell complied with the LCP regulation in some instances, yet it provides no basis for separating the acknowledged "good" from the alleged "bad." Finally, as described in II.B below, the forms referenced by the Amended Complaint do not really contain any false statements.

It is simply impossible for Wisconsin Bell to investigate and answer such vague, non-specific allegations. Where would one begin? Moreover, the absence of any specificity is especially critical here, because of the underlying implausibility of Relator's theory.[6] While Relator alleges that Wisconsin Bell "routinely has withheld information" about the VNS Agreement (Am. Compl. ¶ 42), he does not and cannot allege that Wisconsin Bell concealed the Agreement, or that the arrangement with DOA was a secret. As shown above, the VNS Agreement is publicly accessible on the Internet, so it is highly unlikely that Relator could ever

[6] The absence of specificity is also prejudicial because it prevents Wisconsin Bell from determining which of Relator's claims are time barred. *See* Section III *infra*.

show the Agreement was fraudulently concealed. Certainly, the Amended Complaint (like its predecessor) fails to provide any such facts. Relator's allegations of "implied" misrepresentation are patently insufficient to satisfy Rule 9(b).

2. Relator's Allegations Of "Express" Misrepresentation Are Equally Deficient.

Recognizing that the allegations of "implied" fraud are patently insufficient, Relator tries to create an illusion of specificity by adding assertions of "express" misrepresentation. The "express" statements were allegedly made in certain forms submitted to USAC, the E-Rate administrator. The Amended Complaint alleges that in these forms, Wisconsin Bell falsely certified that it was in compliance with the "lowest corresponding price" regulations. In reality, none of the cited forms contains any such representation, as shown in Section II.B below.

B. Relator Fails to Identify a Claim Or a Statement That Was False.

A key determinant of liability under the False Claims Act is the existence of a false claim or statement. The FCA imposes liability against (1) a person who knowingly presents a *false claim* to the government for payment or (2) a person who knowingly makes a *false statement* to get such a claim paid. 31 U.S.C. § 3729(a)(1), (2) (emphasis supplied).[7] Thus, to state a claim for relief under § 3729(a)(1), a relator must establish three elements: "(1) a false or fraudulent claim; (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval; (3) with the knowledge that the claim was false." *U.S. ex rel. Walker v. R*

[7] The Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub.L. No. 111–21, 123 Stat. 1616 (2009), amended the FCA, including modifications to the section numbering of the liability provisions of the False Claims Act. *See id.* at § 4. Relator uses the pre-amendment section numbering, and in any case, FERA is not retroactive and the old version of the statute applies. *See United States v. Toyobo Co. Ltd.*, — F. Supp. 2d —, 2011 WL 3874858, at *4 n. 2, *8 n. 6 (D.D.C. Sept. 2, 2011) (FERA does not have retroactive effect to conduct alleged before 2009); *Mason v. Medline Indus.*, 731 F. Supp. 2d 730, 734–35 (N.D. Ill. 2010). Accordingly, all references and citations to §§ 3729(a)(1), (2) are to the statutory text of the FCA as it existed when the original complaint in this suit was filed in 2008.

& F Prop. of Lake County, Inc., 433 F.3d 1349, 1355 (11th Cir. 2005). Likewise, a complaint alleging violation of § 3729(a)(2) must establish: "(1) the defendant made a statement in order to receive money from the government, (2) the statement was false, and (3) the defendant knew it was false." *Gross*, 415 F.3d at 604.

As with the original complaint, Relator spends the bulk of the Amended Complaint describing the E-Rate Program and alleging at a high level of generality that Wisconsin Bell did not publicize the favorable VNS rates to some unidentified group of E-Rate customers. (Am. Compl. ¶¶ 29–47.) The Amended Complaint still fails to allege *any* particular statements or claims that were made to the government, much less show why those statements or claims might plausibly have been false. Without such details, these allegations are insufficiently pled. *See U.S. ex rel. Themmes v. Hamilton Enterprises, Inc.*, No. 04-C-700, 2005 WL 1268784, at *7 (E.D. Wis. May 26, 2005) (relator must plead (1) the identity of the person who presented the false claim to the government, (2) the time, place, and content of the allegedly false claim for payment, and (3) the method of fraudulent communication) (citing *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7th Cir. 1994)).

More fundamentally, the Amended Complaint's "fraud" depends on allegations about the "lowest corresponding price" that still do not have the requisite specificity. Even if one accepts the allegations that the prices in some contracts differed from those in the VNS Agreement (all Relator has provided are a few"examples"), Relator does not allege sufficient facts to plausibly show that the prices in the VNS Agreement are in fact the "lowest corresponding prices" for the services contracted by any of the schools or libraries identified in the Amended Complaint.

Instead, Relator nakedly asserts a legal conclusion that "[t]he favorable rates available to the State of Wisconsin and all authorized users under the . . . VNS Agreement are Wisconsin Bell's LCP for E-Rate Program purposes." (Am. Compl. ¶ 41.) But the Amended Complaint still

does not include any allegations to plausibly support this bald conclusion. For example, the Amended Complaint does not show that the services were being provided to similarly situated customers, a showing that is required to make LCP requirements applicable. *See* 47 C.F.R. § 54.500(f). Further, although the Amended Complaint cites two broad "example" services (Centrex and ISDN), and claims that some contracts contained higher prices for those services than the VNS Agreement, it does not specify *all* the services that are being challenged. Even the two "examples" are broad categories of services that encompass many specific variations, and the Amended Complaint does not show that the specific services provided are similar. For example, both Centrex and ISDN services may be furnished with differing feature packages, line counts and blocking requirements, among other things. Also, they are available only from suitably equipped central offices without additional construction charges. Finally, the Amended Complaint does not confront other possible factors that may affect price. *See* Section II.C *infra*. This Court is "not . . . bound to accept as true a legal conclusion couched as a factual allegation" and should disregard the unsupported allegation of falsity here. *Kolbe & Kolbe Health & Welfare Benefit Plan v. Medical College of Wis., Inc.*, 657 F.3d 496, 502 (7th Cir. 2011).

The Amended Complaint attempts to paper over these fundamental defects by claiming that false statements were contained in certain forms submitted to USAC by Wisconsin Bell or by applicants. As discussed in Section II.A above, these claims still lack the specificity that Rule 9(b) requires. Moreover, as discussed below, none of the referenced forms actually contains any of the false statements that have been alleged.

1. Form 473.

Form 473 is a "Service Provider Annual Certification Form" that "every service provider must fill out annually." (Am. Compl. ¶ 59.) Realator alleges that "[e]ach and every Form 473

submitted between 1997 and 2009 by Wisconsin Bell was false" because Wisconsin Bell was not in compliance with the lowest corresponding price ("LCP") regulation. (*Id*. ¶ 64.)

Relator's theory crumbles as soon as one reads the actual Form on which Relator relies.[8] A copy of that Form and its Instructions are attached as Ex. A. Form 473 does not contain any representation or certification of compliance with the LCP regulation. Instead, it contains the provider's name and contact information (lines 1–8), followed by seven specific certifications (lines 9–15), none of which even mentions LCP. Ex. A at 1. The only representations that relate to price at all state (i) that "[t]he prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program have been arrived at independently," without consulting other providers for the purpose of restricting competition, and (ii) that those offered prices "will not be knowingly disclosed by this service provider, directly or indirectly, to any other offeror or competitor before bid opening." *Id*. at 1 (lines 14–15). Those certifications track section 54.504(f) of the E-Rate rules (*see* 47 C.F.R. § 54.504(f)), a provision that is entirely separate from the LCP regulation in section 54.511(b). Moreover, these two certifications on price do not address substantive prices, only the bidding procedure.

The Amended Complaint (¶ 62) instead tries to challenge the certifications in lines 10 and 11 of the Form. Both challenges are baseless. Line 10 states only that "[t]he Service Provider Invoice Forms that are submitted by this service provider contain requests for universal service support for services which have been billed to the service provider's customers on behalf of schools, libraries, and consortia of those entities, as deemed eligible for universal service support by the fund administrator." Ex. A at 1. By strategically emphasizing the "deemed eligible"

[8] Because the Amended Complaint cites and relies upon Form 473 (and the other Forms discussed in this section), the Court may consider the actual contents of those Forms (which are a matter of public record) on a motion to dismiss. *McCready v. eBay, Inc.*, 453 F.3d 882, 891–92 (7th Cir. 2006); *Henderson v. U.S. Bank, N.A.*, 615 F. Supp. 2d 804, 808 (E.D. Wis. 2009).

clause, the Amended Complaint tries to create the impression that line 10 certifies that the *invoice forms* have been "deemed eligible for universal service support by the fund administrator," and that being "deemed eligible" for support includes compliance with LCP regulations. (Am. Compl. ¶ 62.) But that is not what line 10 really says. By its plain terms, line 10 certifies that it is not the invoice forms but the "schools, libraries and consortia" – the phrase that appears right before the "deemed eligible" clause – that have been "deemed eligible" for support. That plain reading lines up with the FCC's rules. As described above, those rules contain a separate provision (section 54.501) defining eligible entities, and the bulk of the other E-Rate rules impose requirements and restrictions on *applicants*, not service providers.

Line 10's only certification with respect to *invoices* is that they "contain requests for universal service support" that have been billed "on behalf of" eligible "schools, libraries and consortia." Ex. A at 1. The Amended Complaint does not dispute that every applicant receiving service from Wisconsin Bell was eligible for support, and that every invoice was billed on behalf of an eligible school, library, or consortium. Thus, line 10 does not contain any false statements.

The Amended Complaint makes the same false step with respect to Line 11 of Form 473. That line certifies that claim forms "are based on bills or invoices issued by the service provider to the service provider's customers on behalf of schools, libraries, and consortia of those entities, as deemed eligible for universal service support by the fund administrator, and exclude any charges previously invoiced to the fund administrator." Ex. A at 1. Here too, Relator uses bold print to make it look like the service provider is certifying that its own "bills or invoices" have been "deemed eligible for support by the fund administrator." (Am. Compl. ¶ 63.) Again, Relator is misreading the plain language of the Form. By its plain terms, the "deemed eligible" clause applies to the schools or libraries receiving services, which appear right before that "deemed eligible" clause. Line 11 simply certifies (i) that the provider's claim forms submitted to the plan

administrator "are based on" the actual "bills or invoices" for services rendered to "schools, libraries, or consortia of those entities," (ii) that those schools or libraries have been "deemed eligible for support," and (iii) that the provider's claim forms "exclude any charges" that were already invoiced to the plan administrator. Ex. A at 1. There is no allegation that any of those statements was false on any Form 473 submitted by Wisconsin Bell. Once again, Form 473 itself refutes the Amended Complaint's allegation that "[e]ach and every Form 473 submitted between 1997 and 2009 by Wisconsin Bell was false."

Because the plain language of the Form itself is fatal to the claim of "express" fraud, the Amended Complaint tries to shift focus to the Form's instructions. The instructions state generally that Form 473 "confirm[s] that the invoice forms submitted by each service provider are in compliance with the FCC's rules." (Am. Compl. ¶ 59.) As a general statement of purpose, that statement is true – Form 473 does confirm compliance with some FCC rules – but Relator twists the instruction to make it sound like Form 473 certifies compliance with *every* FCC rule. That is not true. There is no certification that tracks the LCP regulation (section 54.511)(b)). Nor is there any "catch-all" certification that confirms compliance with all FCC regulations.

Plainly, when the FCC desired applicants or providers to certify compliance with a given regulation, it said so clearly, taking the exact language of that specific regulation and putting those same words in the certification form. As shown above, for example, lines 10 and 11 of Form 473 correspond to section 54.504(f)(1)-(2) of the FCC's E-Rate rules. Similarly, the certifications in Form 470 (completed by applicants) track section 54.503(c)(2)(i)-(vii). *Compare* FCC Form 470 and Instructions for Completing FCC Form 471, attached as Ex. C, *with* 47 C.F.R. § 54.503(c)(2)(i)-(vii). But when it came to the LCP regulation, the FCC did *not* ask providers to make any certification. Indeed, the FCC specifically considered such a certification and decided not to include one.

The FCC's first draft of Form 473 *would have* included a certification of compliance with the LCP regulation and a "blanket" certification of compliance with Program rules. *See* Draft FCC Form 473, attached as Ex. B.[9] But after obtaining feedback from applicants, providers, and other interested parties, the FCC dropped that certification from the final version of the Form. *Compare* Ex. B (draft Form 473) *with* Ex. A (final version). Perhaps one reason is because the FCC had not given providers guidance on how to interpret and apply the LCP regulation. *See* Sections II.C and II.D *infra*. It would have been fundamentally unfair to make providers certify compliance with a regulation the FCC had not fully explained. But whatever reasons the FCC had, the plain language of Form 473 does not contain any statements about compliance with the LCP regulation. Thus, assuming, *arguendo*, the Relator's claim that Wisconsin Bell did not comply with the LCP regulation, the form does not and cannot contain any of the "false claims" or fraudulent statements of LCP compliance that the Amended Complaint alleges.

2. Form 471

The Amended Complaint's references to Form 471 are simply additional attempts to make weight with hollow arguments. As its very title makes clear, Form 471 is a certification by "schools and libraries" and a "description of services ordered" that does not contain any statements by service providers like Wisconsin Bell. Ex. D at 1. The instructions confirm that "[t]his form is designed to help *schools and libraries* to list the eligible services they have ordered and estimate the annual charges for them." *Id*. (emphasis added).

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[9] In Line 17 of the draft Form, the FCC proposed to make service providers certify that "the rates charged . . . for goods and services provided pursuant to the program are its lowest and are competitive with the rates generally paid for similar services and equipment in the local community." Ex. B at 2 (line 17). Line 14 of the draft Form would have required each provider to certify that it had "complied and will comply with all applicable program rules when invoices are submitted and acknowledge that failure to do so may result in the cancelation of funding requests, the repayment of funds to USAC, and referral to appropriate authorities for possible law enforcement action." *Id*. (line 14). Neither certification appears in the final Form (Ex. A).

The Amended Complaint does not allege that this Form contains any false statements by Wisconsin Bell. Instead, Relator contends that Wisconsin Bell caused *applicants* to make false statements that Wisconsin Bell's prices complied with the LCP regulation. (Am. Compl. ¶¶ 70–71.) Once again, however, Relator's theory founders when one reads the actual Form, because it does not contain any certifications (even by the applicants) about LCP compliance. Nor would one expect applicants to certify compliance with the LCP regulation: that regulation applies to service providers, not applicants.

The Amended Complaint's allegations about Form 471 rest on two critical misstatements. First, Relator alleges that Form 471 includes the applicant's certification that it selected "the most cost-effective *service*." (Am. Compl. ¶ 68; emphasis added.) In reality, the applicant certifies that "all bids submitted were carefully considered and the most cost-effective service *offering* was selected." Ex. D at 6 (line 27; emphasis added). The difference is critical; the applicant certifies only that it picked the most cost-effective service that was offered in the bidding process, *not* that it obtained the lowest cost "service" it could conceivably have obtained (the way Relator misreads it). The plain language of the certification tracks the underlying E-Rate rules, which instruct applicants to solicit bids and choose among the bids received (47 C.F.R. § 54.503) rather than requiring them to investigate all conceivable sources and prices.

Second, Relator claims that Form 471 certifies "that all competitive bidding requirements have been complied with." (Am. Compl. ¶ 68.) By using passive voice and omitting the subject, Relator is trying to create the impression that the applicant certifies that *all* parties, including the service provider, have complied with the bidding requirements. But that is not what the Form says. Rather, Form 471 says only that "the entity or entities listed on this application" – in other words, *the applicant* – has complied with applicable bidding requirements. Ex. D at 6 (line 28). Again, the difference is critical. The applicant does not certify that service providers, or anyone

other than the applicant, has complied with any regulation. Thus, the service provider's alleged non-compliance with its own requirements under the LCP regulation have no effect on the truth or falsity of the applicant's certification.[10]

3. Form 472

Relator's arguments about Form 472 are equally off point. As with Form 471, the "certification" on Form 472 (along with the bulk of the statements on that Form) come from the "Billed Entity" and not from the service provider. *See* Ex. E. The Amended Complaint mischaracterizes the Form by alleging that "**Form 472 is jointly submitted by the applicant and the service provider**" and that "[t]he service provider must sign the Form 472." (Am. Compl. ¶ 69; emphasis in original.) The end of the form contains an "Acknowledgment" by the "Service Provider," but that simply promises to remit the E-Rate discount to the billed entity within 20 business days after receiving payment from the fund administrator, and before making use of that payment. That promise tracks section 54.514(b) of the E-Rate rules, a requirement that is entirely separate from the LCP regulation (section 54.511(b)).

Moreover, Form 472 does not contain any representation by the service provider (or even by the applicant) regarding compliance with the LCP regulation. The Amended Complaint's allegation (¶ 69) that the school or library certifies that the amounts listed on the Form "represent charges for eligible services delivered to and used by eligible [applicants]" has nothing to do with LCP compliance. By its plain terms, the certification relates to the FCC's separate rules defining "eligible services" (47 C.F.R. § 54.502) and eligible schools, libraries, and consortia (*id*. § 54.501), not to the LCP regulation (which appears in section 54.511).

[10] Similarly, the certification in Form 471 (line 30) that "*the school or library* has 'complied with all program rules'" (Am. Compl. ¶ 68; emphasis added) says nothing about the *service provider's* compliance with the LCP regulation or any other obligation.

C. Relator Does Not Plead Wisconsin Bell's Knowledge of the Falsity of Any Statement Or Claim.

The FCA is intended to punish only wrongdoing, not honest mistakes. *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). As the U.S. District Court for the Southern District of New York recently explained:

> Where a relator alleges that a claimant's interpretation of an ambiguous regulation renders its claims false under the FCA, falsity is evaluated by examining whether the interpretation is *correct* in light of applicable law; but whether a claimant acted knowingly in submitting a false claim turns on the *reasonableness* of the claimant's interpretation.

U.S. ex rel. Colucci v. Beth Israel Medical Center, 785 F. Supp. 2d 303, 316 (S.D.N.Y. 2011) (emphasis in original; citations and quotation marks omitted); *cf. U.S. ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 657 F. Supp. 2d 1039, 1056 (S.D. Iowa 2009) (on motion to dismiss, ruling that "[b]ecause Defendants' claims were based on a reasonable interpretation of the regulatory requirements, their claims cannot be said to be 'false' under the FCA."). "[W]here the well-pleaded facts do not permit the court to infer more than the *mere possibility* of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1950 (emphasis supplied) (quoting Fed. R. Civ. P. 8(a)(2)). A mere challenge to a service provider's reasonable interpretation of regulations cannot support a suit under the FCA. *See*, *e.g.*, *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477–78 (9th Cir. 1996).

The FCC has determined that under a number of circumstances, the prices charged to two schools or libraries participating in the E-Rate Program can differ significantly without violating the lowest corresponding price rules. *See*, *e.g.*, *In re: Federal-State Joint Board on Universal Service, Report and Order*, CC Dkt No. 96-45, 12 FCC Rcd. 8776, ¶¶ 486–89 (FCC 1997) ("*Universal Service Report and Order*"). The FCC has given examples of such circumstances – from differences between customers in terms of "mileage from switching facilit[ies]" to "length

of contract" – but has left the door open to additional circumstances. *Id.* ¶ 488 ("[W]e find it reasonable for rates to reflect any factors that clearly and significantly affect the cost of service[.]"). There is a reasonable debate about whether these circumstances should also include, for example, differences in the manner by which the E-Rate applicant purchases the service provider's services. Indeed, that precise debate is pending before the FCC right now. *See* Pet. U.S. Telecom Association and CTIA—The Wireless Association for Declaratory Ruling Clarifying Certain Aspects of the "Lowest Corresponding Price" Obligation of the Schools and Libraries Universal Service Program, CC Dkt No. 02-6 (Mar. 19, 2010) (seeking clarification that § 54.511(b) only applies to contracts entered after the § 54.511(a) bidding process).

The Amended Complaint asserts that Wisconsin Bell "knew that LCP was an express requirement of the E-Rate program and that compliance with the LCP was a material condition for reimbursement." (Am. Compl. ¶ 58.) But it does not even *allege* that Wisconsin Bell knew of its alleged non-compliance with the LCP regulation. Indeed, Relator now claims that Wisconsin Bell did not know what its "lowest corresponding prices" even were. (*Id*. ¶ 35.) Wisconsin Bell assumes, for the sake of argument, that it is true that Wisconsin Bell does "not want to provide [its] services to its E-Rate customers" at the "relatively low" VNS prices (*id.* ¶ 36), that it "routinely . . . withheld information" about VNS pricing (*id.* ¶ 42) and that it knew that most schools and libraries were "not sophisticated enough . . . to actually determine what Wisconsin Bell's best prices" were (*id.* ¶ 36). Yet none of these allegations raise the plausible inference that Wisconsin Bell knew it was not complying with the LCP regulation, or that it was unreasonable under the circumstances for Wisconsin Bell to charge two specific schools different rates. Without such allegations, Relator has not met his pleading obligation with respect to the critical element of knowledge.

D. Because the Lowest Corresponding Price Regulation Is Ambiguous, Relator Cannot Plead That Wisconsin Bell Knew of the Falsity of Any Statement Or Claim It Made.

The Amended Complaint in this case depends on Relator's theory that Wisconsin Bell knew it was not in compliance with the LCP regulation. Honest disputes over interpretation cannot suffice. In *SafeCo Ins. Co. of Am. v. Burr*, the U.S. Supreme Court determined that although an insurer erroneously interpreted provisions of the Fair Credit Reporting Act dealing with when consumers must be notified that a rate increase is related to their credit rating, the insurer could not be held civilly liable for a reckless violation of the statute because its interpretation was not unreasonable. 551 U.S. 47, 69 (2007). The insurer believed that it did not have to advise new customers when their rate included a premium related to a poor credit score because it interpreted the operative statutory term, "increase," as requiring prior dealings. *Id.* at 61–62. The *SafeCo* Court disagreed with that narrow interpretation of "increase," but noted that:

> This is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC . . . . Given this dearth of guidance and the less-than-pellucid statutory text, [the insurer]'s reading was not objectively unreasonable[.]

Id. at 70 (noting that the statute was silent on the point of reference from which a rate increase should be measured). Courts in FCA cases have similarly declined to impose liability where a defendant had to interpret an ambiguous statute, particularly where they had to do so without any authoritative guidance. *See*, *e.g.*, *U.S. ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 984 (10th Cir. 2005)) (collecting cases to affirm district court's dismissal of complaint for failure to state a claim under the FCA and ruling that because defendants' claims were an "[e]xpression of a legal opinion . . . depending . . . on the resolution of two sets of inherently ambiguous determinations by defendants [they] cannot form the basis for an FCA claim."); *Hixson*, 657 F.

Supp. 2d at 1057 ("Here, Defendants acted according to a plausible interpretation of the law that no court had ever contradicted. While the interaction of [regulations] creates an ambiguity . . . acting according to a reasonable interpretation of that ambiguity does not qualify as knowing or reckless disregard for falsity under the FCA.").

Similarly here, Relator will never be able to allege that Wisconsin Bell's interpretation of its obligations under the LCP regulation is unreasonable. This is because the Program's LCP rules are ambiguous and have never been given an authoritative interpretation that could render a service provider's own attempts to understand and comply with them unreasonable.

Beyond the *Universal Service Report and Order*, which left the issue open, neither the FCC nor any court has ever given service providers a list of acceptable criteria for determining which schools and libraries are and are not similarly situated for lowest corresponding price purposes. Service providers, such as Wisconsin Bell, have no authoritative benchmark against which to determine that the criteria they use are impermissible. Indeed, Relator's allegation that Wisconsin Bell did not *know* what its LCPs were (Am. Compl. ¶ 35) simply confirms the ambiguity of the LCP regulation. Because no such benchmark existed at the time of the alleged fraudulent conduct, Relator cannot meet his burden to plead facts that would permit the Court to infer "more than the mere possibility of misconduct." *Iqbal,* 129 S. Ct. at 1950.[11]

[11] Because the E-Rate program is highly regulated and the FCC (and the Public Service Commission of Wisconsin) have not provided authoritative benchmarks for applying the LCP regulation, Wisconsin Bell reserves its right to seek primary jurisdiction referral to the FCC or the PSCW if the question of LCP compliance requires such a referral. *See* 47 U.S.C. § 254; *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (permitting referrals under the primary jurisdiction doctrine to administrative agencies with "specialized experience, expertise, and insight" when the issues to be resolved fall "within the realm of administrative discretion"). The E-Rate rules expressly state that "Rate disputes" may be brought before the FCC or applicable state commission. 47 C.F.R. § 54.504(c).

III. IF THE AMENDED COMPLAINT IS ALLOWED TO PROCEED, THE COURT SHOULD STRIKE RELATOR'S ATTEMPT TO "TOLL" THE STATUTE OF LIMITATIONS.

The FCA includes a statute of limitations, which bars civil FCA actions if brought:

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). Therefore, section (b)(1) provides a basic six-year limitations period, while section (b)(2) provides a three-year tolling provision for claims that are not known "by the official of the United States charged with responsibility to act."

The Amended Complaint's lack of specificity makes it impossible for Wisconsin Bell and the Court to assess which (if any) of Relator's claims have been timely filed. It is clear, however, that a substantial portion of Relator's claims is *not* timely, but barred. Relator alleges that Wisconsin Bell has been violating the FCA "since the inception of the E-Rate Program in 1997" (Am. Compl. ¶ 77) more than 11 years before the original complaint and thus well outside the six-year limitations period. And tellingly, the Amended Complaint claims that the statute of limitations should be tolled because of Wisconsin Bell's alleged concealment of FCA violations (*id.* ¶¶ 11–16). Plainly, Relator knows that the six-year limitations period would bar a substantial portion of his claims; otherwise, he would not have raised any issue about tolling.

The Amended Complaint's "tolling" arguments find no support in the FCA. The FCA explicitly ties the tolling provision to the knowledge of an "official of the United States." 31 U.S.C. § 3731(b). Enforcing the plain language of the statute, three of the four Circuits to address this issue have held that the tolling provision applies only to cases brought by the

Attorney General or cases in which the government has intervened, and does not apply to *qui tam* actions like this one, in which the government has not intervened.

In 2006, the Tenth Circuit overruled several district court cases and held that "§ 3731(b)(2) was not intended to apply to private *qui tam* relators at all." *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006). As the court reasoned, "this result is more in accord with the FCA's stated purpose of encouraging prompt action on the part of relators and would discourage those relators who chose to delay on bringing an FCA claim, or refrain from informing the government of the fraud, to allow increasing damages to accrue." *Id.* at 725–26.

In 2009, the Fourth Circuit agreed, holding that "Section 3731(b)(2) extends the FCA's statute of limitations beyond six years only in cases in which the United States is a party." *U.S. ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288, 293-94 (4th Cir. 2008). The Fourth Circuit relied on the plain language of § 3731(b)(2), which "refers only to the United States – and not to relators," and the fact that "government officials are certainly not 'charged with responsibility' to ensure that a relator brings a timely FCA action." *Id.* at 294. Moreover, the court noted the similarity between 31 U.S.C. § 3731(b)(2) and 28 U.S.C. § 2416(c), which "tolls the generally applicable statute of limitations in actions brought by the United States – and only by the United States – until 'facts material to the right of action' are actually or constructively known by an 'official of the United States charged with the responsibility to act in the circumstances.'" *Id.* In addition, the court found that "allowing relators to sit on their claims would undermine the purpose of the *qui tam* provisions of the FCA: to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not – 'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Id.* (quoting *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943)).

The Fifth Circuit has reached the same conclusion. *See U.S. ex rel. Erskine v. Baker*, No. 99-50034, 2000 WL 554644, at *1 (5th Cir. Apr. 13, 2000) (holding that § 3731(b)(2) does not apply to non-intervened claims by relators).[12]

The more recent district court decisions also support the plain reading that the FCA's tolling provision does not apply in non-intervened *qui tam* actions. *See*, *e.g.*, *U.S. ex rel. King v. Solvay S.A.*, No. H-06-2662, 2011 WL 4834030, at *54–55 (S.D. Tex. Oct. 12, 2011); *U.S. ex rel. Bauchwitz v. Holloman*, 671 F. Supp. 2d 674, 693–95 (E.D. Pa. 2009); *U.S. ex rel. Howard v. Lockheed Martin Corp.*, 499 F. Supp. 2d 972, 980–81 (S.D. Ohio 2007); *U.S. ex rel. Finney v. Nextwave Telecom, Inc.*, 337 B.R. 479, 486 (S.D.N.Y. 2006).

Moreover, a recent decision by the United States Supreme Court also supports this reading of the FCA's tolling provision. In *U.S. ex rel. Eisenstein v. City of New York*, the Supreme Court held that the relator in a non-intervened FCA case does not receive the extra time for filing a notice of appeal that applies when the United States is a party. 129 S. Ct. 2230, 2233 (2009). Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U.S.C. § 2107(a) require, generally, that such a notice be filed within 30 days of the entry of judgment, but Rule 4(a)(1)(B) and § 2107(b) extend the period to 60 days when the United States is a "party." Resolving a circuit split, the Supreme Court determined that the government is not a "party" in a *qui tam* case in which it has not intervened. *Eisenstein*, 129 S. Ct. at 2233. Consequently, the relator was not entitled to the same added time as the government. *Id.*

Just as the rules in *Eisenstein* gave extra time only in cases in which the "United States" is a party, the tolling provision here is limited to claims that are not known by the appropriate

[12] In addition, the Sixth and Eleventh Circuits have decided cases by applying the six-year limitations period to relators, without discussing the tolling provision for government officials. *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 515, 519–20 (6th Cir. 2007); *Foster v. Savannah Commc'n*, 140 F. App'x 905, 907–08 (11th Cir. 2005).

"official of the United States." *Eisenstein* makes clear that a relator is not a "surrogate" of the United States. *See*, *e.g.*, *Bauchwitz*, 671 F. Supp. 2d at 694–95 (citing *Eisenstein* and holding that FCA tolling provision does not apply to non-intervened *qui tam* claims).

It is true that an early Ninth Circuit decision held that the tolling provision in § 3731(b)(2) applies to relators regardless of the government's lack of participation in the case. *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996). And some district courts have reached the same result. But the weight of authority – in particular, the weight of *recent* authority – goes against Relator. Thus, if the Court allows the Amended Complaint to proceed at all, it should strike Relator's allegations of tolling.

CONCLUSION

The Court has no subject matter jurisdiction to hear Relator's Amended Complaint because the Complaint is premised on publicly available information. Moreover, to sustain a False Claims Act complaint, specificity and particularity are required. Relator's Amended Complaint still lacks both. Consequently and for the reasons described in detail above, Wisconsin Bell's Motion to Dismiss the Amended Complaint of Plaintiff/Relator Todd Heath should be granted. In the alternative, the Court should strike Relator's allegations on the subject of "tolling" the FCA's limitations period.

Date: January 30, 2012

Respectfully submitted,

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